IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6557 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO No

2. To be referred to the Reporter or not? Yes :

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO No

5. Whether it is to be circulated to the Civil Judge? : No

PALITANA SUGAR MILLS PVT LTD

Versus

STATE OF GUJARAT

Appearance:

MR.D.R.DHANUKA, SR.COUNSEL WITH MR.MANEK KALYANIWALA, SOLICITOR, WITH MR.NILESH A. PANDYA FOR Petitioners

MR. S.N.SHELAT, ADDL. ADVOCATE GENERAL WITH MR SP HASURKAR for Respondent Nos.1 & 3

MR.P.M.THAKKAR WITH MR NAVIN K PAHWA for Respondent No. 2

MR.J.R.NANAVATI FOR MR AR THACKER for Resp. No. 4

REST OF THE RESPONDENTS ARE SERVED

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 17/12/1999

C.A.V. JUDGEMENT

1. Notice of this writ petition was served on the respondents. Shri S.N.Shelat, learned Addl. Advocate General with Shri S.P.Hasulkar appeared and argued the matter for and on behalf of respondents No.1 & 3, whereas Shri P.M.Thakkar and Shri N.K.Pahva appeared for respondent No.3 and Shri J.R.Nanavati, appeared for

respondent No.4. The remaining respondents did not appear despite service of notice. Counter Affidavits have been filed by the respondents No.1 to 4. As such this petition is proposed to be finally disposed of at this stage.

2. In the writ petition, 13 prayers have been made by the petitioners. The Petitioner No.1 is Palitana Sugar Mills Private Limited, a company incorporated under the Indian Companies Act, 1956, whereas the petitioner No.2 is the Managing Director of the petitioner No.1 company. No doubt number of prayers have been sought in the writ petition, but the main dispute is regarding notification Annexure A/2 dated 6.8.1999 issued by the respondent No.1 and also regarding mistake in the revenue records in relation to Survey No.471/2. According to the petitioners, this plot belongs to the petitioner No.1 which was purchased through Sale Deed dated 30.3.1971 for a valuable consideration from Dr.Virbhadrasinhji Gohil and that some mistake occurred in describing 80 Acres, which is part of the area of this plot to be Bore Talav or Gauri Shanker Lake or pond. Several representations were made by the petitioner for rectification of the mistake which, despite recommendation from the Competent Authority, was not rectified. According to the respondent No.4 this 80 Acres of portion of Survey No.471/2 is part of Gauri Shanker lake or water body which is under the management and supervision of the respondent No.4, and as such the impugned notification is perfectly valid and legal and that it has been issued keeping in view the larger public interest that it has to be preserved as lake so that the discharge of water during monsoon season does not cause any harm to the public in general and residential houses are not sub-merged due to over-flowing of water from Gauri Shanker lake.

3. The case of the respondent No.1 is that the impugned notification was issued in exercise of the powers under Section 17 of the Gujarat Town Planning & Urban Development Act, 1976 (for short "the Act"). Hence the impugned notification cannot be quashed.

4. The case of the respondent No.2 - Bhavnagar Area Development Authority is also to the same effect.

5. After hearing at great length Shri D.R.Dhanuka, Senior Counsel on behalf of the petitioner and Shri S.N.Shelat, learned Additional Advocate General, on behalf of respondents No.1 & 3, Shri J.R.Nanavati and Shri P.M.Thakker, for and on behalf of respondents No.2 &

4 respectively and after examining carefully the entire material placed on record by the petitioners and the counter Affidavits of these respondents, following facts emerge from the record :

A. On 30.3.1971 the petitioner No.1 purchased from Dr.Virbhadrasinghji Gohil Survey Plot Nos.469/1, 470/1, 471/2 paiki, 471/3 and 472 in village Vadva, Taluka Bhavnagar which was registered on 2.4.1971. The Sale Deed was executed for a consideration of Rs.4,64,000/-. The executant of the Sale Deed executed the same in the capacity of Karta of joint Hindu family as well as for himself. The dispute in the present petition is, however, only with regard to about 80 Acres of land of part of Survey plot No.471/2. The total area of land purchased was 3761658 sq.mtrs.

B. On coming into force of the Urban Land (Ceiling & Regulation) Act, (for short "ULC Act"), the petitioner No.1 made a declaration and submitted housing scheme for economically weaker section of the society under Section 21 of the ULC Act. The competent Authority by order dated 6.12.1979 sanctioned the said scheme with administrative concurrence, approval and consent of the State Government for which Pages : 42 to 52 of the Paper Book can be referred.

C. On 24.7.1980 Bhavnagar Municipal Corporation filed Special Civil Application No.941 of 1980 before this Court in which the petitioners and others were respondents. This Court, in that petition, passed an order inter-alia permitting the petitioner of this petition to construct residential houses at his own risk and cost. The said petition is still pending. Pages : 182 and 183 of the Paper Book can be referred.

D. On 8.11.1985 the Government of Gujarat, through notification, sanctioned the draft development plan for Bhavnagar as well as the regulations thereto, subject to the modification so finalised, it was specified that the final development plan shall come into force with effect from 1.1.1986. In the map pertaining to Survey Nos.469, 470, 471 and 472 the disputed land which is part of Survey No.471/2 having an area of 80 Acres was shown as Water Body.

E. The Collector, Bhavnagar, under his letter dated 29.8.1986 addressed to Suprintendent, Land Records and Deputy Consrvator of Forest, Bhavnagar, called upon them to inter-alia take measurement afresh of the land of Survey Nos.471/2, 471/4 and 472 of the petitioners' land

jointly. This letter was addressed in view of inconsistancy maintained in the report of the District Inspector of Land Record (for short "D.I.L.R.") vide pages No.193 to 196 of the Paper Book.

In response to this letter, on 31.12.1986, the Surveyor made his report and forwarded the same to the D.I.L.R. regarding measurement of land bearing Survey Nos. 471/.2, 3 & 4. Inter-alia it was stated in the report that the measurement was not done by Binocular and in this regard no previous records were available. On measurement being taken through Binocular the total area comes to 778 Acres - 90 Gunthas. However, as per village form No.7/12 the measurement comes to 744 Acres - 27 Gunthas. It was contended that this itself shows that the allegations that the petitioner No.1 has encroached upon the land of the water body is incorrect and stands demolished because 33 Acres - 36 Gunthas were evidently less, and as such the D.I.L.R. on 15.1.1987 submitted a report to the Superintendent, Land Records, Bhavnagar, that there is no encroachment of any person what so ever, for which Pages Nos.202 and 203 of the Paper Book can be referred. There is no record of measurement available in the office of D.I.L.R. which is evident from page No.200.

F. On 12.3.1996 and 19.3.1996, the office of the Collector, directed the D.I.L.R. to take immediate measurement of the land Survey No.248 paiki which was recorded as lake in the revenue records in view of certain complaints received that there was encroachment over the land of the lake for which pages No.206 and 207 of the Paper Book can be referred. The Bhavnagar Municipal Corporation also requested the D.I.L.R. through letter dated 19.3.1996 to take measurement and make survey of the land pertaining to Bore Talav (lake of water body) and decide its boundry, vide page No.208 of the Paper Book.

G. On 23.8.1996 the office of the D.I.L.R. submitted final report in persuance to letter dated 12.3.1996 of the Collector and in the said report it was stated very clearly that the land of the petitioners bearing Survey No.471/2 did not fall within the boundries of the Bore Talav for which pages No.215 to 215 of the Paper Book can be referred.

H. On 28.1.1997 the Collector, Bhavnagar, wrote letter to the Superintendent of Land Records, directing him to verify and examine the limits of Bore Talav vide Pages No.221 and 222 of the Paper Book.

I. The Superintendent of Land Records, in compliance

of this letter furnished necessary information to the Collector after verification, examination and scrutinising the subject matter and gave opinion on 10.2.1997 that the Survey No.471/2 on the eastern side is not sub-merged in the lake and that the Surveyor has done measurement as per the provisions of the Bombay measurement Rules and City Measurement Rules. It was also stated that Survey number of Bore Talav was 248 having an area of 561 Acres - 38 Gunthas and the area of nearby survey numbers which have sub-merged are 135 Acres - 30 Gunthas, and all together there is 697 Acres - 28 Gunthas and that it was necessary to pass order for amendment so that the limit of the Bore Talav in the record is finally decided so as to avoid future unnecessary dispute vide Pages No.225 to 228 of the Paper Book.

J. The petitioner No.1, on 10.6.1997, moved an application before the Chairman, Bhavnagar Area Development Authority, bringing to his notice the various correspondence and reports submitted by the D.I.L.R. and it was requested that the defect in the draft development plan where part of Survey No.471/2 has been shown as water body be rectified.

K. The Chief Administrative Officer, Bhavnagar Regional Development Authority addressed a letter on 12.6.1997 to the Commissioner, Bhavnagar Municipal Corporation, requesting him to go through the facts of the petitioners letter aforesaid so that the decision in this regard can be taken, vide pages No.241 of the Paper Book.

L. The Commissioner, Bhavnagar, through his letter dated 16.6.1997 addressed to the Chief Administrative Officer, B.A.D.A. stated that the limits of Bore Talav in the map published is alright except the limit vis-a-vis Survey No.471/2 which is defect as per the measurement carried out it comes only to the road connecting Sidsar - Bhavnagar. In view of this it was requested that Survey No.471/2 be deleted from the development plan from the limits of Bore Talav as the measurement has been done from 15.4.1996 to 20.5.1996 by the Superintendent, Land Record, and D.I.L.R. and they are vested with the legal power to decide the limits.

M. On 12.2.1998 the petitioner No.1 made representation to the Chief Town Planner, Sachivalaya, Gandhinagar, requesting for his intervention in respect of rectification of draft development plan which was pending before the Government. Reliance was placed by the

petitioner No.1 upon the said Survey Reports and other relevant materials pointing out that the petitioners land of Survey No.471/2, area 80 Acres in the development plan, is defective and the same may be deleted and corrected to residential zone, Page : 247 to 251 of the Paper Book.

N. The Chief Town Planner on 9.3.1998 asked the Senior Town Planner, Saurashtra Division, Rajkot to examine the representation of the petitioner No.1, vide Page 260 of the Paper Book. The Town Planning Department of Saurashtra Division forwarded the copy of letter dated 12.2.1998 on 31.3.1998 to the Deputy Town Planner (Junior) Bhavnagar, for scrutiny and report, vide Page : 262 of the Paper Book.

O. On 18.6.1998 the Collector, Bhavnagar, addressed letter to the D.I.L.R. Bhavnagar to prepare a new map of Bore Talav, Page No.264 of the Paper Book.

P. On 25.6.1998 the D.I.L.R. addressed letter to the Collector, Bhavnagar, reiterating the facts as submitted in the earlier reports and the D.I.L.R. also requested the Collector to issue necessary instructions for rectification of entry in the revenue entry vide pages No.267 to 269 of the paper book.

Q. However, strangely enough, on 15.7.1998 the Municipal Commissioner, Bhavnagar, addressed letter to the Chief Administrative Officer, Bhavnagar Area Development Authority, withdrawing the letter dated 16.7.1997 of his predecessor vide page No.273. Obviously, the petitioner No.1 was likely to be astonished and shocked through this surprise development and suspected that it was on account of some political interference in the matter.

R. On 5,8,1998 the Deputy Town Planner forwarded his detailed report to the Senior Town Planner, Rajkot, so that necessary changes can be made in the development plan with regard to Survey No.471/2. It was recommended that the said Survey number be removed from the water body. It was observed that the limit of the Bore Talav is only upto the road joining Bhavnagar - Sidsar road and it should be kept in residential zone, vide Pages : 275 to 281 of the Paper Book.

S. On 9.11.1998 the Collector, Bhavnagar, wrote to the D.I.L.R. seeking factual information in respect of the areas and the measurement of land bearing Survey No.471/2 to 4 and asked its opinion, vide pages No.289 to

290 of the Paper Book. The D.I.L.R., vide his letter dated 9.11.1998 gave his opinion furnishing relevant information on the basis of Survey report, vide pages No.291 to 294.

T. Thereafter on 27.11.1998 the petitioner No.1 filed Civil Suit No.775 of 1998 in Civil Court, Bhavnagar, seeking inter-alia the stay of the letter dated 15.7.1998 of the Municipal Commissioner, in which the trial Court granted ad.interim injunction as prayed for by the petitioner. It may also be mentioned that the respondent No.4 also filed Civil Suit bearing No.329 of 1998 in the Civil Court, Bhavnagar and both the Suits are said to be pending. No decision has yet been taken in the aforesaid two suits. The injunction granted in favour of petitioner No.1 in Civil Suit No.775/98 is still operative and its operation could not be stayed in the Appeal filed by the respondent No.4.

U. It appears that some articles were published in the news paper. The Additional Collector, Bhavnagar, on 15.6.1999, therefore, addressed letter to the Municipal Commissioner, and various other Authorities to examine the facts emerging from the news paper articles, vide page No.299 of the Paper Book. The D.I.L.R. forwarded detailed report on 24.6.1999 to the Additional Collector, reiterating his earlier opinion and report and clarified the facts in relation to Bore Talav stating that the Press Reports are false. Vide Pages : 303 to 306 of the Paper Book.

6. These are the first set of events.

7. The second set of events emerging from the record are as under :

A. On 7.7.1999 the respondent No.1, namely, the State Government, issued notification dated 7.7.1999 in exercise of powers conferred under the Gujarat Town Planning & Urban Development Act stating that the Bhavnagar Area Development Authority has prepared and published revised draft development plan and the Government proposes to modify the said draft development plan as per schedule appended to the notification. It further called for the objection with respect to the proposed modification, which reads as under :

"calls upon any person to submit suggestions or objections, if any, with respect to the proposed modifications to the Additional Chief Secretary to the Government of Gujarat, Urban Development

and Urban Housing Department, Sachivalaya, Gandhinagar, in writing within a period of two months from the date of publication of this notification in the official Gazette."

Item No.17 of the Schedule reads as under :

"The land bearing R.S.No. 471/2 part of village Vadva which is designated for water body (Gauri Talav) shall be deleted from the said use and the land so released shall be designated for "Residential Use" under Section 12(2)(a) of the Town Planning and Urban Development Act, 1976 as shown in the accompanying plan."

(vide pages : 310 & 314 of the Paper Book)

8. Strangely enough, though, in the notification dated 7.7.1999 two months time was allowed from the publication in the official Gazette for filing objections, still on 6.8.1999 vide notification dated 6.8.1999 the respondent No.1 rescinded item No.17 of the Schedule appended to the notification dated 7.7.1999 vide Page : 315 of the paper Book. It is this notification which has been challenged in this writ petition with a prayer that it may be quashed because it is malafide exercise of powers and that it is contrary to the powers conferred under the Gujarat Town Planning Act and that it is arbitrary, without application of mind, that item No.17 was rescinded even before expiry of period of two months given for filing objection.

9. The petitioner No.1 has also filed Rejoinder Affidavit along with certain annexures. Large number of annexures have been annexed with the main petition and several annexures are annexed with the Rejoinder Affidavit. On the other hand no document has been filed by the respondents No.1, 2 & 3.

10. On the above material Shri Dhanuka, learned Counsel for the petitioners contended that there is apparent mistake in the record regarding entry of plot No.471/2, area 80 Acres, and it has been wrongly described as part of "Bore Talav" or "Gauri Shanker lake" and this error and mistake was sought to be rectified on the motion of the petitioner No.1 and despite favourable reports regarding correction of mistake the same was not rectified rather benefit was tried to be taken of the letter dated 15.7.1998 of the Municipal Commissioner addressed to the Chief Administrative Officer, BADA, withdrawing the letter dated 16.6.1997, page 273 of the

Paper Book, Annexure : V. It was contended by Shri Dhanuka that this letter was written without any foundation and it has not been indicated what was misunderstanding in the earlier letter dated 16.6.1997 which had to be withdrawn by this letter dated 15.7.1998. He also contended that even if objections were not filed before the Area Development Authority the representation made by the petitioner No.1 could be treated in the nature of objection and the revised draft development plan could not be sanctioned, more particularly, when in the previous notification this land was designated for residential purpose as against Bore Talav. Subsequent notification dropping item No.17 of the earlier notification, according to Shri Dhanuka, was also arbitrary.

11. Certain objections in the nature of preliminary objections were raised by Shri J.R.Nanavati, learned Counsel for the Municipal Corporation, respondent No.4. In the first place he contended that no relief claimed by the petitioners can be granted in exercise of jurisdiction under Article 226 of the Constitution of India inasmuch as even if it is assumed that there is some mistake in the record the factual error or mistake cannot be corrected in exercise of jurisdiction under Article 226 of the Constitution of India and according to him the proper remedy is to approach the Competent Authority or the Civil Court. His another objection has been that the disputed question of ownership in the plot No.471/2 is involved and this factual dispute, including the mistake in the designation of the land of this plot, can be decided only by adducing proper evidence, oral as well as documentary, and this exercise cannot be undertaken under Article 226 of the Constitution of India. He, further contended that the correctness of survey reports has been disputed and disowned by the counter Affidavit of Shri Arvind Katara, Resident Deputy Collector, Bhavnagar. The value of the affidavit of Shri Katara will be discussed later on. At first it is to be seen whether there is actually any disputed question of fact involved in this case which cannot be decided or seen in exercise of jurisdiction under Article 226 of the Constitution of India. According to Shri Nanavati the plot in question is part of Bore Talav and Bore Talav is under the management of the Municipal Corporation, hence the petitioner No.1 can have no title in the said plot and there is thus disputed question of title which cannot be decided by this Court under Article 226 of the Constitution of India. In my opinion, the contention cannot be accepted. It has to be seen whether actually there is any real dispute of title between the petitioner

No.1 and the Municipal Corporation, the respondent No.4. Mere denial of title of the petitioner No.1 at the time of argument or in the Counter Affidavit would not constitute disputed question of fact regarding ownership or title. On the other hand from the material on record it appears that the petitioner No.1 has not sought declaration of its title in the property. On the other hand the petitioner No.1 has tried to show prima facie that the entire plot No.471/2 is the personal property of the petitioner No.1 which was purchased by it from the previous owner Dr.Virbhadrasinghji Gohil as back as in the year 1971 through Registered Sale Deed dated 2.4.1971. Shri Dhanuka pointed out that prior to 30.3.1971, namely, the date of execution of Sale Deed this property was recorded in the name of the previous owner Dr.Virbhadrasinghji Gohil and from 1979 to 1999 it is entered in the name of the petitioner No.1. At no point of time this property was entered in the ownership of the Municipal Corporation. The Municipal Corporation is managing the affairs of Bore Talav, known as Gauri Shanker Lake, and it has a distinct survey No.248. Thus, the petitioners' land 471/2 is distinct from survey No.248. Not only that, the petitioners' land and the Bore Talav bear different survey numbers, but there is admission of the Bhavnagar Municipal Corporation in Special Civil Application No.941 of 1980 filed in this Court, in which the petitioner No.1 of this writ petition was respondent No.8 in that petition and Dr.Virbhadrasinghji Gohil was the respondent No.9. In para : 2 of this writ petition, vide Page : 396 annexed to the Rejoinder Affidavit, page : 345, there is categorical admission by the Bhavnagar Municipal Corporation, the petitioner of that writ petition, that the lands in question were sought to be transferred by a registered document dated 31.3.1971 in favour of Palitana Sugar Mills pvt.Ltd., respondent No.8 herein by respondent No.9 herein. Copy of Sale deed was also annexed in that petition as Annexure : A. It was also admitted that the respondent No.8 claimed title over the land in persuance of the registered document, Annexure : A. Consideration was also mentioned to be the same as alleged by the petitioner of this writ petition. In para : 2 of the said petition it was further admitted by the Municipal Corporation that Maharaja Virbhadrasinghji was owner of Survey Nos.469 to 472 and it was an agricultural land since many years. In this way the respondent No.4 before me has admitted the ownership of Maharaja Virbhadrasinghji Gohil as well as title of the petitioner No.1 in entire plot No.471 which was subsequently divided in sub-parts. In face of this admission the respondent No.4 cannot be permitted to raise imaginary dispute that

plot No.471/2 is Bore Talav land under the management and supervision of the said Corporation. If in face of this admission attempt is tried to be made to raise dispute of title it can be said to be imaginary dispute and on such imagination, the jurisdiction of this Court under Article 226 of the Constitution of India, cannot be curtailed or taken away.

12. So far as maintainability of the petition is concerned Shri Nanavati contended that correction of mistake in revenue entry is not possible under Article 226 of the Constitution of India. Actually there is no specific prayer by the petitioner that the mistake be ordered to be corrected. On the other hand the petitioner is aggrieved from the fact that despite admission of the Competent Authority on the representation of the petitioner No.1 that Survey No.471/2 should not be designated as Bore Talav, no correction has been made and as such the said land in the revised plan may not be designated as Bore Talav or water body. So far as correction of mistake is concerned the concerned Authority admitted the mistake and prayed for correction which is clear from the Annexures on the record and some of which have been mentioned in the forgoing portion of the judgment.

13. So far as the designation of the land for the purpose of draft development plan is concerned it can be seen from the record whether designation is correct or incorrect. As such I do not find any force in the contention that the petition is not maintainable or any relief sought by the petitioner is required to be rejected. Of course large number of reliefs have been sought by the petitioner and after considering the entire material I feel that all the reliefs cannot be granted. However, this exercise will be undertaken when the question of relief to be granted to the petitioner is taken up for consideration. Thus preliminary objections raised by Shri J.R.Nanavati are found without substance.

14. Shri S.N.Shelat, learned Additional Advocate General also raised preliminary objection that the writ petition is premature and not maintainable. I do not find substance in this contention also because the writ petition cannot be considered to be pre-mature. Once the impugned notification was issued in a hurried manner the petitioners had reasons to apprehend that depite their earlier representation pending before the competent Authority for consideration the revised draft development plan may be immediately sanctioned and given effect to. In view of this apprehension petition cannot be said to be premature.

15. After rejecting the preliminary objections it has to be seen whether the petitioners have succeeded in prima facie showing that there is apparent mistake in designating the land of plot No.471/2, Area 80 Acres, as water body or Bore Talav. On the basis of various survey reports on record Shri Dhanuka learned Counsel for the petitioner contended that there is over-whelming prima facie evidence emerging from the records and correspondence that thereis apparent and patent mistake in designating the petitioners' private land as Bore Talav and as such the action of the respondent No.1 in issuing the impugned notification is arbitrary and malafide and it was evidently hurried malafide action on the part of the respondent No.1.

16. From the Annexures on record it seems that the Annexure : D/2 is a map showing boundry of petitioner's land and the boundry of Gauri Shanker Talav. Annexure : D/3 is the map showing that by mistake water body is shown in the petitioner land in the development plan. Annexure : D/4 is the detailed survey map of the Gauri Talav which was prepared on the basis of survey made from 15.4.96 to 20.5.1996 by D.I.L.R., Bhavnagar.

17. The order dated 6.12.1979, Annexure : A, of the Competent Authority under the ULC Act shows that permission was granted to the petitioner under Section 21(2) of the ULC Act to construct residential houses for weaker sections of the society. It is indicated in the order the purpose for which sanction was accorded by the competent Authority under Section 21 of the ULC Act. Thus, the Competent Authority under the ULC Act observed Revenue Survey No.471/2 as the property of Palitana Sugar Mills, petitioner No.1. The petitioner No.1 was granted permission to construct over 930 Acres and 4 gunthas of land of three survey plots. A writ petition was filed by the Bhavnagar Municipal corporation against the State Government and others in which the respondent No.8 was the petitioner No.1 of this writ petition and respondent No.9 was the predecessor in title of petitioner No.1. The order passed in the aforesaid writ petition is at Annexure : E which shows that the ad.interim relief was vacated and the respondent No.8, namely, Palitana Sugar Mills Pvt. Ltd. was granted liberty to construct at its own cost and risk over the land involved in that petition. The said petition is still pending. So here also prima facie title of the petitioner was taken into consideration. This order was passed on 24.7.1980. In that writ petition the Bhavnagar Municipal Corporation challenged the scheme sanctioned by the competent

Authority u/s.21(1) of the ULC Act. Upto this stage it cannot be said that the title of the petitioner No.1 was at any stage challenged or disputed.

18. The second stage comes when the development plan process commenced in 1963. Annexure : F, Page : 184, is the notification through which draft development plan was sanctioned on 8.11.1985 which was to come into force with effect from 1.1.1986. It seems that Assembly question was also raised vide Annexure : G. For that also reply was given in which factual position was clarified that Survey No.471 was divided into three parts, out of which 471/2 and 471/3 were transferred from Government Waste land in the name of Maharaja on the basis of private ownership right. There was no mention that it was a Bore Talao or a part of Bore Talao. Annexure ; I is the report of the D.I.L.R. from which it can be said that since the previous records were not available, earlier survey of plot No.471/2 was not done by Binoculor. No record except the record of 1926 could be made available. There was no other map on the basis of which survey could be made or that the old map could be super-imposed over the new survey map. As such the survey from plain table method and binoculor was the only mode to conduct survey. I, therefore, do not find any merit in the contention of Shri Nanavati that survey conducted by respondents No.5 & 6 on plain table of Survey No.248. is unreliable. The Survey was sought by the Corporation and the survey fee was also deposited which is evident from the record. If no other old record was available the measurement carried out and survey done was according to the settled survey principles. The survey was to be conducted to demarcate the area of Bore talav, Survey No.248, vide Annexure : J. Page : 208 shows that the required fee was deposited by the Municipal Corporation.

19. There was some allegation that portion of Bor Talav has been encroached upon by the petitioner, but this was found negatived on actual survey, vide page No.212 of the Paper Book, conducted by the office of the D.I.L.R., which found that as many as 11 head-strong elements have unauthorisedly taken possession of portion of Survey No.248 and their names and addresses are given at page No.214. The petitioner does not figure in this list. Consequently from this document it is clear that Bore Talav has a different survey No.248, over which no encroachment was made by the petitioner; rather encroachment was made by 11 other persons, but it seems that no action has so far been taken for removal of encroachment by the Municipal Corporation.

20. Annexure : M is another report from Superintendent, Land Record office, showing that inter-alia plot No.471/2 is a private property which rules out that it was part of Survey No.248. It is further clear from Annexure : M that measurement was carried out with Binoculor and plain table method and also considering the old record. A metalled road in Survey No.471/2 and 472 was found which joins Sidsar with Bhavnagar and there is a road which is in the centre of revenue Survey No.471/2 and 472 and this road is about 8 to 10 ft. high than the lake level. No portion of Survey No.471/2 on the eastern side was found sub-merged in the lake. Shri Nanavati tried to criticise this report on the ground that it is report from III Grade Surveyor which is not authentic. However, the office of the Superintendent, Land Record, through Annexure : M, in response to Annexure : L, wrote that the measurement was done in accordance with provisions of the Gujarat Measurement Rules/City Survey Manual. It was pointed out that the measurement was done correctly. Consequently this report cannot be ignored. Here also request was made for amendment of the limit of Bore Talav.

21. Annexure : M is the report dated 10.6.1997 of the petitioner to the Regional Development Authority, drawing its attention regarding factual mistake for necessary action, but no action was taken by the Authority.

22. Annexure : P is the letter of the respondent No.4 to the respondent No.2 where the mistake was admitted and the Regional Development Authority was requested to correct the mistake and release the Survey No.471/2 from Development plan from the limit of Bore Talav and amendment in the revised development plan was suggested to be made, but nothing was done. Thus, in 1997 the respondent No.4 admitted the mistake and further admitted that the limit of Bore Talav shown in the development plan in Survey No.471/2 is false and that the limit of the Bore Talav, according to the survey measurement done between 15.4.1996 to 20.5.1996, is only upto the road connecting Sidsar - Bhavnagar.

23. Annexure : Q shows that the petitioner No.1 wrote to the Chief Town Planner Office, Gandhinagar, on 2.12.1998 intimating factual position and requesting for rectification of mistake. In face of these two letters, the petitioner No.1 cannot be blamed for not filing any objections. It was admitted that objection was not filed by the petitioner No.1 to the revised development plan,

but since the dispute was pending and representation was made by the petitioner it could be treated as objections.

24. From Annexure : U also it appears that the office fo the D.I.L.R. wrote letter on 25.6.1998 to the Collector seeking permission for amendment in the land of Survey No.471/2 so that the defect in the revenue record ceased, but no order was passed.

25. From Annexure : W, from the Town Planning Department, opinion of the Chief Town Planner, Saurashtra Division was called in the matter and detailed opinion was given. Opinion No.3 shows that the land in question is of the ownership of Palitana Sugar Mills Pvt. Ltd. This opinion was given after perusing the details mentioned in the 7/12 extract of village form. The Opinion on question No.3 is that on perusing the measurement map (Annexure : e) the land of survey No.471/2 comes only after the limit of Bore Talao and road joining Bhavnagar -- Sidsar. Opinion No.6 is that no portion of land of Survey No.471/2 is sub-merged in the Bore Talav. Opinion on the same question is that the Survey No.471/2 is out side the Bore Talav and it is false that it is part of water body or Bore Talav. Again request was made for removal of defect. In reply to question No.9 again similar opinion was given that necessary changes be made deleting Survey No.471/2 from the limit of Bore Talav. In the compiled opinion it was again mentioned that Survey No.471/2 is not part of Bore Talav, and it is private property. The concluding opinion is plot No.471/2 could be removed from the water body in the development plan and kept in residential zone considering the surrounding zone. Even this report was ignored.

26. In Annexure : Z also Revenue Survey No.471/2 was treated as private property and it was negatived in it that the petitioners have encroached upon any portion of Bore Talav land. On the other hand 11 persons were found to have encroached upon the Bore Talav land Survey No.248.

27. From the discussion of above documents it is clear that right from the begining there was admission on the part of the Officer of the D.I.L.R., who conducted survey, that Survey No.471/2 was private property of the petitioner No.1 and that it was wrongly shown as water body in the development plan. For so many years this dispute was going on unnecessarily inasmuch as there was no real and subsisting dispute regarding the area of the water body. Inspite of this, the Commissioner Shri

M.K.Das in his letter dated 15.7.1998, Annexure : B, had withdrawn and revoked the earlier letter dated 16.6.1998 where the previous Commissioner admitted the mistake and prayed for rectification. This letter is useless, because the basis for this letter is that the earlier letter was written due to some misunderstanding. What was the actual misunderstanding, was not mentioned. Earlier letter of 16.6.1997 was not written by Shri M.K.Das. As such misunderstanding, if any, could be subjective satisfaction of the officer writing previous letter. If subsequent letter was written by another officer, he should have given grounds for misunderstanding. On the other hand the records, discussed above, show that there were ample survey reports and correspondence indicating that there was not even remote ground for misunderstanding. It appears that on the basis of this letter the Municipal Corporation made all efforts to make the petitioner run from pillar to post and to see that the petitioner No.1 could not succeed in utilising its land despite permission to build residential houses for economically weaker sections of the society granted by the Competent Authority under the ULC Act.

28. It also emerges from the record that the Municipal Corporation wanted to acquire the land, but the State Government refused permission. News paper reports were also publised, but those news paper reports, on examination were found to be false.

29. Shri Nanavati contended that the earlier letter of the Commissioner dated 16.6.1997 has no significance and value because it amounts on the part of the Commissioner to transfer the land to the petitioner No.1. I am affraid, if this contention can be accepted. Since the land Survey No.471/2 never vested in the Municipal Corporation, the Commissioner could not transfer the same nor he had transferred the same to the petitioner No.1. It was not unilateral action of the Commissioner to write the earlier letter. The letter of the Commissioner and the matter reported by him were placed before the Board and after passing the resolution the Board accepted the Report and the letter of the Commissioner on 21.6.1997. Thus, if the letter of the Commissioner dated 16.6.1997 was ratified through a resolution of the Board, the earlier action of the Commissioner cannot be said to be high-handed or in the nature of conferring undue benefit upon the petitioner No.1.

30. On the other hand, subsequent letter dated 15.7.1998, Annexure : B, of the Commissioner Shri

M.K.Das was without any substance and foundation. The petitioner attempted to obtain stay of operation of this letter by filing Civil Suit in the Civil Court, Bhavnagar vide Regular Civil Suit No.775 of 1998 and the stay order was obtained. The said injunction or stay order is still operating and has not been vacated, vide Annexure : A/8 and A/9 of the Rejoinder Affidavit. It was argued by Shri Dhanuka that Appeal was preferred against Annexure : A of the Rejoinder Affidavit and in the said Appeal the respondent No.4 remained unsuccessful in obtaining order for staying the operation of the injunction order granted and confirmed by the Civil Court.

31. The next contention of Shri Nanavati for Respondent No.4 had been that the Counter Affidavit of the Collector filed on 29.11.1999 demolishes the case of the petitioners that the earlier Survey Reports were reliable and as such no reliance should be placed on the earlier survey reports based on measurement from plain table. He also pointed out from this Affidavit that the Survey was done not by any skilled Surveyor, but by a Class - III surveyor and that too against the principles of survey and without notice to the respondent No.4, hence no reliance can be placed on earlier survey reports. The contention of Shri Nanavati that the Affidavit of 29.11.1999 was filed by the Collector is apparently incorrect. This Affidavit was filed by Resident Deputy Collector, Bhavnagar. A Deputy Collector cannot be equated in status with Collector. So factually it is incorrect that this Affidavit was filed by the Collector. Secondly, this Affidavit is no Affidavit in the eyes of law because verification clause is wholly defective. It reads like this, "solemnly affirmed on this 29th day of November, 1999 at Ahmedabad." This is no verification of Affidavit in the eyes of law. The aforesaid verification does not show what was actually solemnly affirmed before the person administering oath to the deponent. The requirement of law is verification should be parawise and it should be specifically stated which paras of the Affidavit are sworn and verified on personal knowledge and which paras are sworn and verified on information and belief and which paras are sworn and verified on legal advise. This is totally missing in this Affidavit. It is also not clearly stated that all the above paragraphs numbering 47 have been solemnly affirmed by the deponent. Consequently, this Affidavit cannot be said to be an Affidavit in the eyes of law. At the most it can be said to be a paper indicating the stand of the Respondent No.3. Since this stand is not supported on oath nor by any other material or document it cannot be said that what is stated in this Paper is

Correct and reliable. It is also not stated how Shri Arvind Katara, Resident Deputy Collector was authorised to file Additional Affidavit nor it is stated that he was ever posted at Bhavnagar earlier and that he had knowledge from the record about what was stated in the so called Affidavit. He has not clarified how the letters of the Collector and previous Commissioner were incorrect and how the survey reports were incorrect. Merely by stating that the survey report was prepared by Class III cadre surveyor, it cannot be said that the survey reports are defective. These survey reports were examined by the office of the D.I.L.R. and then the higher authorities were informed accordingly. Thus, it is equally incorrect to state in this paper that there was no testing by the higher Authority. He had also no courage to state that any other record except the survey map of 1926 is available. Consequently, the surveyor, no matter he belonged to ClassIII cadre, committed no mistake in making survey from plain table and the binoculor. In the absence of latest map superimposition of latest map with the survey map prepared by the surveyor in this case could not be done. It was not a report prepared by Local Inspection or only on the basis of plain table measurement. The area of Gauri Shanker lake was already available in the map of 1926. The said area could be located with reference to the plain table measurement and also by measurement from Binoculor. Since there is enough material on record to show that the plot number of water body is seperate, namely survey No.248, and the plot number of the disputed land is 471/2, the two plots could be seperately located by the surveyor. There is also abundant material on the file of the case to show that Survey No.471/2 is seperate from the area of lake and there is also fencing and road as indicated above in this judgment. Consequently, I am unable to accept the contention of Shri Nanavati that actually there is affidavit from the Deputy Collector or that it has demolished, in any way, the case of the petitioners. The counter Affidavit of the Deputy Collector is not only invalid, but it seems to be an after-thought with a view to demolish the case of the petitioners on untenable grounds.

32. Shri J.R.Nanavati, however, contended that the objections of the Corporation, the respondent No.4, are in public interest and not on the basis of dispute of ownership or title. This contention itself shows that the Municipal Corporation, the respondent No.4, now does not raise the question of ownership and title in plot No.471/2 nor it could successfully raise such dispute of ownership or title in this plot. As observed earlier it

could not be shown by the respondent No.4 that plot No.471/2 or any portion thereof was given in the management of the respondent No.4 for the purposes of water body or Gauri Shanker lake. So far as the question of public interest is concerned Shri Nanavati vehementally argued that on account of excess rains and excess flow of water during monsoon season the area may be flooded causing loss to human life and property. This is one aspect of public interest, argued by Shri Nanavati. But there is another aspect of public interest, namely, the petitioner No.1 is going to level the land and raise construction which is also to some extent for public purpose, namely, for allotting the dwelling units so raised to the weaker sections of the society. Comparision of two public interests has, therefore, to be made. There is nothing on record that till date in Bhavnagar there was excessive flood on account of which the road demarcating plot No.471/2 was ever sub-merged or that any area of Bhavnagar was so sub-merged with water that there was danger to public life and property. Annexure : Y shows that the Collector Office, Flood Control Department, Bhavnagar, through letter dated 15.6.1999 wrote to the four Authorities mentioned in this letter, to examine the correctness of news item in Gujarat Samachar dated 8.6.1999 that before a calamity like Morbi happens the land of Bore Talav should be obtained back by legal fight. The reply was given through Annexure : Z in which it was stated again that plot No.471/2 was private property and that nothing was indicated in this report that there was any imminent danger of flood on account of which incident like Morbi could occur. On the other hand, it was mentioned in this report that 11 persons have encroached upon 58 - Acres 28 Gunthas of land of Bore Talav which should also be removed because there is fear of loss of human life. So whatever fear of loss of human life was entertained in the mind of the office of D.I.L.R. was to the lives of 11 persons who have encroached upon 58 Acres 28 Gunthas of the land of Bore Talav which has a seperate number. Thus, this contention of Shri Nanavati about public interest also can not be accepted nor it can be accepted that the public interest highlighted by Shri Nanavati is to be considered as paramount. On the other hand, if there is no imminent danger of flood nor any such flood came in the last so many years the other public interest, namely, construction of dwelling units for weaker sections of the society is to prevail.

33. Shri Nanavati also contended that a case under the Agricultural Ceiling act was already pending before

the Tribunal and in the mean time Urban Land Ceiling Act came into force. The stand of the Government was that Agricultural Ceiling Act was not applicable rather Urban Land Ceiling Act applied and as such permission u/s.21 of the Act was granted by the competent Authority to the petitioner to construct dwelling units vide Annexure : A. According to Shri Nanavati, this action of the competent Authority was definitely with a view to treat the petitioner No.1 in a special category and to oblige it. However, unnecessarily malafide cannot be inferred against the Competent Authority under the ULC Act while passing the order dated 6.12.1979. Since there is no material on record to infer such malafide unnecessary criticism against that would be undesirable and without any material on record. Earlier petition on the subject is already pending since 1980 vide Special Civil Application No.941 of 1980, hence no discussion on that point is desirable from this Court, because that petition was ordered to be assigned to a Division Bench of this Court.

34. From the aforesaid discussions it is clear that the petitioner No.1 has been able to show by strong prima facie evidence that inter-alia plot No.471/2 is its personal property which was purchased through registered Sale Deed dated 30.3.1971 from erstwhile Maharaja Dr. Virbhadrasinghji Gohil and that no real and substantial dispute of ownership could be raised or shown by the respondent No.4 from any document filed on its behalf; rather Shri Nanavati in the course of arguments admitted that he is raising objection to the petition in the larger public interest and not on the ground of dispute of title or ownership in plot No.471/2. It is further clear from the voluminous record of this petition, which has been examined in the foregoing portion of this judgment, that mistake in entries was acknowledged by the concerned Authorities and despite repeated correspondence by the concerned Authority the mistake was not rectified. It is therefore difficult to accept the contention that the petitioner should be directed to approach Competent Revenue Authority. The Competent Authorities were already requested to order for rectification of the mistake and inspite of admission of the Commissioner of the respondent No.4 that there existed mistake which required rectification nothing was done. The petitioner's request for rectification of mistake should have been accepted and the plot No.471/2 should not have been designated as Bore Talav. Since this has not been done direction to this effect is required to be issued by this Court. This is first set of dispute which stands resolved with the above observation.

35. The next dispute is regarding notification issued under the Gujarat Town Planning & Urban Development Act, 1976. The first notification, Annexure : A/1, was issued on 7.7.1999 and was published in the Gazette Extra-ordinary of the date. Under this notification proposed draft revised development plan was published calling any objections and suggestions from any person in respect of the proposed modification and such objections and suggestions were to be made to the Additional Chief Secretary, Government of Gujarat, in writing within a period of two months from the date of publication of this notification in the official Gazette. Item No.17 of this Notification relates to plot No.471/2. It reads as under:

17. "The land bearing R.S. No.4712 Part of village Vadva which is designated for water body (Gauri Talav) shall be deleted from the said use and the land so released shall be designated for "residential use" under Section 12(2)(a) of the Town Planning & Urban Development Act, 1976, as shown in the accompanying plan. (Annexure " P/17")."

The notification was published in the extra-ordinary Gazette on the same day, namely, 7.7.1999. Objections could be filed within a period of two months from this date, namely, the date of publication in the official Gazette. Without waiting for that period of two months, on 6.8.1999 another notification, Annexure : A/2, was issued under the Gujarat Town Planning & Urban Development Act which recites that in exercise of powers conferred by Sub.Sec.(2) of Section 17 of the Gujarat Town Planning & Urban Development Act, 1976, the Government of Gujarat hereby rescinds item No.17 of the Schedule by modification in the Government Notification inter-alia dated 7.7.1999 published in Extra-ordinary Gazette on 7.7.1999 regarding land of Survey No.471/2 part of village Vadva, District Bhavnagar, of the revised development plan submitted under Section 16 by Bhavnagar Area Development Authority. It is this notification which is under challenge in this writ petition. Learned Counsel for the petitioner Shri Dhanuka contended that this notification is malafide, arbitrary and contrary to the provisions contained in Section 17(2) of the Gujarat Town Planning & Urban Development Act, 1976. It can be noticed from earlier notification dated 7.7.1999 (Annexure : A/1) that at Sr.No.17 the R.S.No.471/2 part of village Vadva which was designated in the earlier plan for the water body (Gauri Talav) shall be deleted from

the said use and the land so released shall be designated for residential use. The question of title was not involved in this notification. On the other hand earlier designated use for water body was deleted and was redesignated for residential use. Objections against these modifications were to be filed by anybody within a period of two months from 7.7.1999. This period expired on 7.9.1999, but before that item No. 17 was rescinded vide notification dated 6.8.1999 in exercise of powers under Section 17(2) of the Act. Shri Dhanuka rightly contended that Section 17(2) of the Act is not applicable in this case. Hence, no power could be exercised by the Government in this section. For ready reference Sec.17(2) is quoted below :

> "Where the draft development plan submitted by an area development authority or, as the case may be, the authorised officer contains any proposals for the reservation of any land for a purpose specified in clause (b) or clause (n) of sub-section (2) of Section 12 and such land does not vest in the area development authority, the State Government shall not include the said reservation in the development plan, unless it is satisfied that such authority would acquire the land, whether by agreement or compulsory acquisition, within ten years from the date on which the final development plan comes into force."

36. The above sub.section (2) of Section 17, therefore, clearly contemplates that where draft plan submitted by Area Development Authority or the authorised officers, as the case may be, contains any proposal for reservation of land for the purpose specified in Section 12(2)(b) or clause (n) of sub.Section (2) and such land does not vest in the Area Development Authority, the State Government shall not include the said reservation in the development plan unless it is satisfied that such authority would acquire the land, whether by agreement or compulsory acquisition, within ten years from the date on which the final development plan comes into force. It is undisputed that the land of Survey No.471/2 does not belong to Area Development Authority nor it vests in such authority. There is no indication that the Area Development Authority intends to acquire the land either by agreement or by compulsory acquisition within ten years from the date on which the final development plan comes into force. Hence the Government could not have included the said reservation in the development plan.

Rescinding Item No.17 under Notification dated 6.8.1999 would amount to reserving survey No.471/2 for the purposes of water body. The conditions required to be satisfied under Sub.Section 2 of Section 17 of the Act are therefore not fulfilled. Consequently the Notification could not be issued under Section 17(2) of the Act. Shri J.R.Nanavati also conceded that Section 17(2) of the Act is not applicable on the facts and circumstances of the case. Shri P.M.Thakkar, however, contended that the Development Authority is not concerned with the dispute of title between the Municipality and the petitioner No.1. His contention, however, has been that irrespective of this dispute of title, whether real or imaginary, the Area Development Authority is entitled to designate any land for any purpose in the development plan. This contention cannot be accepted. Section 17(2) itself provides that such designation is possible provided the land which does not vest in the development authority is intended or proposed to be acquired by the Authority within a period of ten years from the date of coming into force the final development plan. Shri Thakkar was unable to show that there is any proposal to acquire the land of the petitioner No.1, namely, Survey No.471/2, within a period of ten years from the date the final development plan comes into force. The development Authority is not authorised under any law including the Gujarat Town Planning & Urban Development Act to acquire anobody's land at its discretion. On the other hand Sub.Section 2 of the Act itself provides that the State Government should be satisfied that Development Authority would acquire the land, whether by agreement or by compulsory acquisition. No agreement between the development Authority and the petitioner No.1 has been brought on record nor there is any indication in the Counter Affidavit of respondent No.2 that Survey No.471/2 is to be compulsorily acquired for which proceedings have been initiated. Consequently I am unable to accept the contention of Shri P.M.Thakkar that notification is valid and the Development Authority was authorised to designate Survey No./471/2 as Bore Talav, Water Body or Gauri Shanker lake.

37. Shri J.R.Nanavati, however, conceding that provisions of Section 17(2) of the Act are not applicable, contended that such deletion in the subsequent notification (Annexure : A/2) is permissible under Section 21 of the General Clauses Act. It is again difficult to accept this contention. If there is specific provision in the Gujarat Town Planning & Urban Development Act, for dealing with such situation the aid of Section 21 of the General Clauses Act cannot be

permitted to be taken. If there would have been ambiguity in the provisions of the Gujarat Town Planning Act or there was total silence under the act regarding power to modify the earlier notification or redesignate certain land the provisions of Section 21 of the General Clauses Act could be used, but not otherwise.

38. Shri S.N.Shelat, learned Addl. Advocate General for respondents No.1 & 3 was also unable to substantiate the view that Section 17(2) of the Act is applicable under which the impugned notification could be issued. He, however, tried to develop his argument by raising the contention that such deletion, rescition or modification is permissible under Section 17(c) of the Act. For ready reference Section 17(c) of the Act is quoted below :

> "Where the State Government has published the modifications considered necessary in a draft development plan as required under the proviso to sub-clause (ii) of clause (a), the State Government shall, before according sanction to the draft development plan and regulations, take into consideration the suggestions or objections that may have been received thereto, and thereafter accord sanction to the draft development plan and the regulations in such modified form as it may consider fit."

39. It is, therefore, obvious from this section that the State Government after publication of the modification considers necessary in draft development plan shall, before according sanction to the draft development plan and the regulation, take into consideration the suggestions or objections that may have been received thereto and thereafter accord sanction to the draft development plan and the regulation in such modified form as it may consider fit. The obligation on the State Government, therefore, is that before sanctioning the draft development plan it has to take into consideration the suggestions or objections that might have been received. The objection of the petitioner No.1 in the shape of representation moved earlier though not technicaly objections as contended by Shri Nanavati, was not at all considered by the state Government, nor the statutory time limit of two months was allowed to expire. In the interim period the impugned notification was issued rescinding item No.17 of the earlier notification regarding proposed modification. The effect of such deletion will be that the earlier designation of plot No.471/2 for water body, Gauri Talav or lake shall continue to remain in force. Such action

is hardly justified under Sub.Section (c) of Section 17 of the Act.

40. Shri Dhanuka, learned Counsel for the petitioners, on the other hand, rightly contended that in view of proviso to Section 17(1)(a) of the Act, unless the State Government considers it necessary that substantial modification in the draft development plan is necessary, may publish the modification in the Official Gazette and unless the State Government considers it necessary to make substantial modification in the draft development plan no notification like the impugned notification could have been issued. The words "considers necessary" are important in this proviso in the impugned notification. On the other hand it is not mentioned that the State Government considered it necessary to delete Item No.17 under the provisions of Section 17(1) of the Act. On the other hand straight-way without assigning any reason the State Government rescinded item No.17 of the earlier notification through the impugned notification and that too without waiting for two months time to expire and further without considering the representation in the nature of objection from the petitioners which must have routed through the competent Authority.

41. Shri Shelat, however, contended that since the final plan has not come into force, sanction could be modified so far as water body is concerned and the petitioners may be directed to approach the State Government accordingly. I, however, do not think it expedient to direct the petitioner No.1 to approach the State Government again. Shri D.R.Dhanuka rightly pointed out that this exercise would not only delay the finalisation of the development plan, but there is also apprehension that in view of long drawn process the State Government may take similar view and immediately reject the objection and sanction the revised plan. The apprehension is not illfounded. The petitioner No.1 purchased the land as back as 30.3.1971 and since then it has not been able to use it for constructing the dwelling houses for weaker sections of the society. A period of 28 years has elapsed and the petitioner No.1 has not been able to use the land to its liking. More over the attempt of the petitioner No.1 to get the mistake rectified also took number of years which materialised in the notification dated 7.7.1999 but it was again frustrated by subsequent notification of 6.8.1999, Annexure : A/2. Consequently, relegating the petitioner No.1 to approach the State Government would be a futile exercise to the detriment of the petitioner No.1. I am,

therefore, unable to accept this suggestion of Shri Shelat.

42. Shri Shelat further contended that objections can be filed by the petitioner No.1 even now. However, the petitioner No.1 relies upon its representation moved earlier before the competent Authority and these objections were examined from different angles and were not found to be without substance. Consequently, permitting the petitioners now to file objections would again be prolonging finalisation of the draft development plan.

43. The contention of Shri P.M.Thakkar that the land in question was designated as Bore talav or water body, for public purpose only, cannot be accepted. On the other hand the counter Affidavit of Shri K.M.Shah of the Urban Development Authority presents altogether different picture. Para : 4 of this Counter Affidavit shows that on 6.8.1999 a delegation of Mayor and the leading citizens of Bhavnagar met the Government. They represented the Government that notification dated 6.7.1999, which should be "7.7.99", was seriously detrimental to their interest, particularly in view of forthcoming monsoon season. The Municipal Corporation, Bhavnagar also forwarded several points for information which could not come to the notice of the Government at the time of first notification dated 7.7.1999. As many as four such points have been mentioned in this para. However, when the veil is lifted, para : 4 of this counter Affidavit shows that because the delegation of Bhavnagar approached the State Government, that the State Government immediately on the said date issued the impugned notification. It is not mentioned in Para : 4, who were other citizens of Bhavnagar who accompanied the Mayor. It is also not indicated that the delegation approached the Chief Minister or any other Minister or officers of the State Government. Only a vague deposition has been made that the delegation represented the Government. The Government is body which consists of Ministers assisted by Bureaucrats. More over even if this ommission is ignored it is clear from Para : 4 that because the Municipal Corporation was fighting tooth and nail and was out to see that the petitioner's interest is crushed that the Mayor took leading role and approached the State Government on 6.8.1999 and was successful in getting hurriedly issued impugned notification on the same date, namely, on 6.8.1999. This itself shows that the impugned notification, Annexure : A/2, is not only arbitrary, but contrary to the provisions of law. No reason has been given in this notification why item No.17

of the earlier notification was rescinded. It is also not mentioned in this notification that the Government considered it necessary to rescind the item No.17 of the earlier notification. However, details given in para : 4 of this counter Affidavit are imaginary and after-thought and not supported by any document or material accompanying this counter Affidavit.

44. Shri Dhanuka tried to argue on the point of malafide in issuing the impugned notification, but I did not allow him to argue on the point and I directed him to confine his arguments only to the legality or otherwise of the impugned notification. Therefore, the allegation of malafide is not being considered in this writ petition.

45. It is further clear from the record that all attempts were made to crush the interest of the petitioner No.1. Assembly questions were put, but with no success. News Items were published, but those publications were found without any substance. It is then the so called delegation of the Mayor which was successful in obtaining the imugned notification which, to my mind, is patently illegal and cannot be sustained. The impugned notification was the result of non-application of mind to the objections or to the time limit within which the petitioner or anybody could file objections to the proposed modification. Hence, also the impugned notification is rendered illegal and invalid which cannot be sustained and has therefore to be quashed.

46. As indicated in the foregoing portion of this judgment the last exercise to be done is what relief can be granted to the petitioners in this petition. As many as 13 reliefs have been claimed, but all the reliefs cannot be granted. The first relief which can be granted is to quash the notification impugned in Annexure A/2, dated 6.8.1999. If this notification is quashed then the earlier notification of 7.7.1999 shall stand restored so far as item No.17 is concerned. Its effect would be that Sub-plot No.471/2 will be designated for residential use and not for water body or Gauri Talav. This description in the draft development plan sanctioned on 8.11.1985 and revised draft development plan published on 27.12.1995 is rendered nul and void and the notification dated 7.7.1999 is liable to be confirmed regarding item No.17. No further direction for rectification of mistake is required to be issued. The petitioners have also requested for permission to use the land for filling up and for consequential reliefs pertaining thereto and

using the said land by construction of residential units and other ancilliary purposes. The entire relief on the point cannot be granted in view of Section 26 of the Gujarat Town Planning & Urban Development Act. Section 26 imposes restriction on development after publication of draft development plan. It provides that on or after the date on which the draft development plan is published in the Official Gazette u/s.13 in respect of any area no person shall carry on any development in any building or in or over any land within the limits of the said area without written permission of the appropriate Authority and without obtaining certificate from the appropriate Authority to the effect that the development charges as leviable have been paid or that no such charges are leviable. Thus, the permission to built is in the nature of permission for development which can be granted only by the Appropriate Authority concerned under Section 26 and Sec.29 of the Act. As such permission to built the dwelling units cannot be granted by this Court irrespective of the fact that such permission was granted by the competent Authority under the ULC Act, Annexure : A. However, the request of the petitioner No.1 that it may be permitted to fill-up the land which is uneven and where there are ditches can be considered sympathetically. If the petitioner No.1 has not been permitted to level or fill-up the ditches since 1971 and wants to fill up the ditches now, it cannot be said that it amounts to development in the strict sense and within the letters and spirit of Section 26 of the Act. However, if very technical interpretation is taken of Section 26, still proviso to this section can come to the rescue of the petitioner. Clause (vii) of the proviso to Section 26 provides that no such permission shall be necessary for the normal use of the land which has been used temporarily for other purpose. Here, the land of the petitioner was used temporarily as uneven land and if the petitioner No.1 wants to use its land as even land, it cannot tentamount to developing such land. Consequently permission to fill-up the land can be granted.

47. After quashing the impugned notification dated 6.8.1999, the respondent No.1 is required to be directed to finalise the revised development plan within a period of six weeks from today in the light of proposed modification set out in item No.17 of Schedule appended to the notification dated 7.7.1999, Annexure : A/1, after following prescribed procedure as set out in the Gujarat Town Planning & Urban Development Act, after considering objections, including objections in the nature of representations and letters written by the

petitioners to the Collector and to the Urban Development Authority earlier. Beyond this no other relief can be granted to the petitioners.

48. In the result, the petition succeeds in part only and is, therefore, partly allowed.

The impugned notification, Annexure : A/2, dated 6.8.1999 is hereby quashed. Item No.17 of earlier notification dated 7.7.1999, Annexure : A/1, shall stand restored. The respondent No.1 is directed to consider all the objections to the proposed modification contained in Annexure : A/1, including the objections of the petitioners, if any, and within a period of six weeks from today, shall finalise the revised draft development plan, after following the prescribed procedure set out in the Gujarat Town Planning & Urban Development Act, 1976 and shall incorporate the proposed modification in the revised development plan. In so doing the respondent No.1 shall not delete, modify or rescind item No.17 of the notification Annexure : A/1. The petitioners are permitted to fill up the land of about 80 Acres of Survey plot No.471/2, but are not permitted to raise any construction under the order of this Court. On the other hand, after revised draft development plan is finalised the petitioners shall obtain requisite permission and Certificate from the Competent Authority as envisaged under Section 26 and Sec.29 of the Gujarat Town Planning & Urban Development Act and shall thereafter proceed to carry on development over the land by raising construction of dwelling units for weaker sections of the society.

In the circumstances of the case no order as to costs.

sd/-

Date : December 17,1999 (D. C. Srivastava, J.)

sas

Shri J.R.Nanavati, Shri P.M.Thakkar and Shri H.P.Hasurkar request the operation of the Judgment may be stayed for a period of four weeks to enable them to obtain requisite order from the higher forum. This request is opposed by Shri N.A.Pandya for the petitioners. However, in the fitness of things time upto 11.1.2000 is granted, during which period the operation of this Judgment shall remain partly stayed. The stay of operation of this Judgment in so far as it quashes the notification (Annexure : A/2) is not to be construed, in the circumstances of the case, as vacation of interim

order granted during pendency of the petition under which operation of the impugned notification was stayed. Permission to fill-up the land is granted at the risk and cost of the petitioners and subject to the orders of the higher forum, if any.

sd/-

Date : December 17, 1999 (D. C. Srivastava, J.)

sas